Central Storage and Transfer Co. of Harrisburg *and* Charles Leo Deaner. Case 4-CA-11760

August 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On February 24, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, counsel for the General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Central Storage and Transfer Co. of Harrisburg, Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the refusal to hire Charles Leo Deaner, Jr., and notify him in writing that this has been done and that evidence of this unlawful refusal to hire will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We note, however, that the Administrative Law Judge made several inadvertent errors in his Decision. First, he stated that Deaner had been a member of the Teamsters for a Democratic Union (TDU) since 1978. We correct such error by noting that Deaner's TDU membership dates back to 1975. Second, the Administrative Law Judge stated that the relevant collective-bargaining agreement required probationary employees to complete 30 days of work within 6 months of their initial employment to achieve seniority status. We correct such error by noting that the relevant provision requires instead that the employee complete 30 days of work within any 6-month period. Once this is completed, the first day worked in the qualifying 6-month period becomes the employee's seniority date. Third, the Administrative Law Judge on several occasions substituted February 26, 1981, for February 25, 1981, as the date on which Respondent refused to offer Deaner employment and as the appropriate seniority date.

[2] We adopt the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to offer employment to Charles Leo Deaner, Jr., on or after February 25, 1981, because the reasons given by Kenneth Flickinger, Respondent's former director of transportation, for his refusal to offer rehire to Deaner (namely, Deaner's opposition to Respondent's training program, to the length of its workday, and to the notion of giving up negotiated benefits if necessary to sustain a dying company) all concern union-related matters. We therefore find that Respondent's discriminatory refusal to hire Deaner based on his expression of protected union-related matters, most particularly his advocacy of strict adherence to the Master Freight Agreement, violated Sec. 8(a)(3). See *J. S. Alberici Construction Co., Inc.*, 231 NLRB 1038, 1042 (1977), enfd. in relevant part 591 F.2d 463 (8th Cir. 1979). In so doing, we find it unnecessary to pass on whether Respondent's conduct also constituted an independent 8(a)(1) violation, to the extent that such violation is argued by the Charging Party in his cross-exceptions or to the extent that the Administrative Law Judge may have addressed this as an issue in the case in his Decision.

We also find that the Administrative Law Judge erred in admitting as record testimony evidence of an alleged job offer in February 1981, because it occurred in the course of settlement negotiations. See *East Wind Enterprises*, 250 NLRB 685, fn. 2 (1980), enfd. 664 F.2d 754 (9th Cir. 1981); Fed. R. Evid. 408.

[3] The Administrative Law Judge found, and we agree, that Respondent illegally refused to hire Charles Leo Deaner, Jr. In accordance with our decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), we shall order the expunction of any reference to this illegal refusal to hire from Respondent's files.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT inform job applicants that they will not be considered for employment because they choose to engage in union activity.

WE WILL NOT discourage our employees from engaging in union activity by refusing to hire, or in any other manner discriminating with respect to their wages, hours, or terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer immediate employment to Charles Leo Deaner, Jr., in an appropriate probationary position on the dock, and will make him whole for lost earnings, plus interest, he sustained by reason of our discrimination against him in the manner set forth in the Decision of the Administrative Law Judge.

WE WILL expunge from our files any reference to our refusal to hire Charles Leo Deaner, Jr., and notify him in writing that this has been done and that evidence of this unlawful refusal to hire will not be used as a basis for future personnel actions against him.

CENTRAL STORAGE AND TRANSFER CO. OF HARRISBURG

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Harrisburg, Pennsylvania, on November 2 and 3, 1981, upon an initial unfair labor practice charge filed on January 12, 1981, and a complaint which issued on February 20, 1981, and which, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to offer employment to Charging Party Deaner because he engaged in activity in support of "Teamsters for a Democratic Union" (TDU). In its duly filed answer, Respondent denied that any unfair labor practices were committed. Following close of the hearing briefs were filed on behalf of the General Counsel, the Charging Party, and Respondent.

Upon the entire record in this proceeding,[1] including my direct opportunity to observe the witnesses while testifying and their demeanor, and consideration of the post-hearing briefs, it is hereby found as follows:

[1] Errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation engaged in the warehousing and shipping of general commodities by motor truck. In 1980, and upon a projected annual basis thereafter, Respondent has and shall derive revenues from the interstate cartage of goods in amounts exceeding $50,000.

Based upon the foregoing, it is found that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 776, herein called the Union, is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This proceeding tests the legitimacy of Respondent's refusal to employ Charles Leo Deaner, Jr., in a dockman's classification on or about February 25, 1981. It is conceded that Respondent hired several trainees in that classification at that time.

Respondent has historically recognized the Union as exclusive employee representative of separate units of drivers, warehousemen, and mechanics. The Charging Party has been a member of the Union since 1968. Like membership on the part of his father, Charles E. Deaner, dated back to 1945. The latter was secretary-treasurer of the Union continuously between January 1967 and January 1979, when he apparently retired. Since 1978, the Charging Party has also been associated with TDU, an internal grouping of union members who seek to promote rigid adherence to the National Motor Freight Agreement and to oppose local union policy to the extent that deviations from the national contract by employers are condoned. Deaner's activity on behalf of TDU included the preparation and distribution of literature on its behalf.[2]

In 1979, at the Charging Party's urging, his father, who over the years had developed an acquaintanceship with Respondent's officials, contacted the latter, in quest of employment for the former.[3] As a result young

[2] I agree with the observation by Respondent that there is no basis for inferring on the primary evidence in this proceeding that Respondent had knowledge of Deaner's role in connection with TDU literature.

[3] The witnesses offered on behalf of and in defense of the complaint in this proceeding afforded testimony at length in peripheral areas which are of no aid to analyses of the critical issue. Details have been omitted to the extent that they are viewed by me as immaterial. Furthermore, the Charging Party as well as John F. Voystock, Jr., Respondent's executive vice president and a principal witness for the defense, impressed me as unreliable. Their mutual penchant for argumentation, lack of straightforwardness, and inclination to pass off self-serving interpretation as fact made it difficult to assess which was the less truthful. To say the least much of the testimony afforded herein was thoroughly unreliable. Al-

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Deaner was hired by Respondent in April 1979 as a probationary employee in the dock worker classification. In this connection it is noted that, by virtue of the subsisting collective-bargaining agreement, a probationary employee does not achieve the status of a regular employee with seniority protection until he completes, to the employer's satisfaction, a 30-day actual work requirement. Furthermore, the contract requires the probationary employee to achieve seniority status within 6 months of initial employment or to start anew. In Deaner's case, this 6-month period expired in October 1979. As of that date, Deaner had worked 11 days in April and May 1979, and 16 days in September and October 1979. Thus, he was 3 days short of fulfilling the probationary requirement upon expiration of the 6-month period.

During the period that followed, Deaner secured occasional work as a "casual employee" with various trucking firms under contract with the Union. His interest in completing his probation and obtaining a seniority position with Respondent, however, was manifest. Thus, to this end he on a monthly basis communicated with Respondent between December 1979 and August 1980. During this period, he had been informed on several occasions by Kenneth L. Flickinger, who was at times material employed by Respondent as its director of transportation, that the Company would be hiring toward the end of the summer 1980. This proved to be the case. In July and August 1980, Respondent interviewed 30 applicants for dock positions under a new training program.[4] Deaner, however, was not afforded concrete information by any representative of Respondent as to the availability of these positions.[5] Nonetheless, on August 27, Deaner, having heard of hiring from other employees at Central, did in fact telephone Flickinger. In that conversation, Flickinger indicated that he had forgotten about Deaner, because several of Central's employees had complained about Deaner's union activities, describing him as the type of person who "stirs up trouble and files grievances," while further indicating that Deaner belonged to a "group" within the Union. Deaner made reference to having alerted Flickinger to the possibility that such accusations might arise, but Flickinger apparently dismissed the entire matter as "just union politics." He then advised Deaner to call in on a weekly basis, as Central was "going to be hiring people shortly."[6] No mention was made by Flickinger, however, of the hiring of two dock trainees on August 26, 1980.[7]

Thereafter Deaner, who claimed to have been unaware that the Company had hired dock trainees in August 1980, contacted Respondent regularly and was generally informed that no work was available. However, eventually in late November he claims to have first learned that Respondent had hired dock trainees in August.

In consequence, on December 1, 1980, Deaner telephoned Flickinger. Previously, opponents of TDU published a leaflet, which may be fairly described as propaganda criticizing TDU supporters, including Deaner. The leaflet included a photograph of Tom Griffith, whom it identified as a member of TDU. Griffith is quoted as having made a statement concerning the "deterioration" of the Master Freight Agreement in consequence of local "sweetheart" arrangements. Deaner, like Griffith, was ridiculed therein as follows:

> We understand Charley Deaner, the former secretary-treasurer (joke)! Has been contacting companies, trying to get his son Leo Deaner a job. Is it because he knows he is too tired to go apply for a job himself. (Daddy will get me one).

This leaflet had not passed Flickinger unnoticed. According to the uncontradicted credited testimony of Deaner, the December 1 conversation opened with his inquiry as to when he would be recalled. Flickinger hesitated, and then, in what turned out to be a reference to the above leaflet, stated: "I got a nasty thing in the mail about you," going on to describe the leaflet as mentioning Deaner and another employee who supposedly worked at Roadway.[8] Flickinger went on to state that the leaflet "creates problems for me which I can't control," and then admittedly "advised Mr. Deaner that he wasn't going to be with us . . . ."

It is clear from the testimony of both Deaner and Flickinger that as conveyed by the latter, Central Storage as of December 1, 1980, determined no longer to consider Deaner for employment.[9] Although Flickinger

though counsel will doubtless disagree, the single item of good fortune in this proceeding is that the dispositive facts are beyond dispute. In any event, the factual account set forth in the above text has been gleaned from credible undenied testimony which was either believable on its face or which seemed entirely plausible when considered against objective fact.

[4] In February 1980, Respondent and Local 776 entered an *ad hoc* agreement authorizing establishment of a training program. Respondent was thereby licensed to hire applicants for driver and/or dockmen positions either as (1) experienced applicants, or as (2) trainee applicants. Under that arrangement, those seeking for employment in category (1) above were eligible only if they met specifically defined work experience criteria. The inexperienced trainees, pursuant to the agreement, could be compensated for an initial 6-month period at 70 percent of the rate for the classification prescribed by the otherwise controlling collective-bargaining agreement.

[5] Deaner testified that commencing in January 1980 he maintained a daily log in which data which at least in part pertained to the issues in this proceeding was recorded. He further testified that, in July 1980, he had a conversation with Flickinger, in which the latter indicated that hiring was anticipated and that Deaner should contact him again in August. This represented an important change of Respondent's hiring stance, for, according to Deaner's own testimony, the various contacts with Respondent dating back to October 1979 merely informed that conditions were slow and that work was unavailable in sufficient quantities to support hiring. Nonetheless, no log entry was made by Deaner with respect to the July 1980 conversation. His testimony that this information was on a separate note which he had clipped to his log was not believed. See Resp. Exh. 7.

[6] It is noted in this connection that the Regional Director on February 26, 1981, dismissed the original unfair labor practice charge insofar as predicated upon any act of discrimination by Respondent on or about August 29, 1980. See Resp. Exh. 1.

[7] To the extent outlined in the above text I credit Deaner's account of the August 27 conversation. His testimony was uncontradicted and, to the extent credited, impressed as truthful and probable in the light of other indisputable matters. In any event, as shall be seen, consideration of the events of August 1980 is viewed as unnecessary to the result ultimately reached on the issue framed by the instant pleadings.

[8] Flickinger acknowledged that G.C. Exh. 4 was the document he had referred to in the December 1 conversation with Deaner.

[9] Although at the time of the December 1 conversation, Respondent was not hiring, on February 25, 1981, Respondent hired four dock train-

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stated that his determination in this respect was not because of "outside influences," his disqualification of Deaner was admittedly founded upon concern for "his attitude and his ability to fit into Central Storage with the other employees and to do and agree and work for what the Company wanted them to."

According to Flickinger, Deaner "didn't feel that concessions . . . should be made to individual companies, that we should live by the contract as it was signed by both parties." The meaning behind the foregoing received further distillation from Flickinger when he went on to describe the objections to Deaner as founded upon: (1) Deaner's having expressed to Flickinger at his initial hire interview that he did not believe that employees should agree to relax negotiated benefits in order to help a company survive during hard times, but instead stated that "if a company can't survive then they should be put out of business"; (2) Deaner's having expressed to Flickinger his opposition to Respondent's training program because it called for the payment of rates at less than those required by the basic collective-bargaining agreement; (3) Deaner's having expressed his opposition to Respondent's utilization of a 13-hour, 20-minute day, because this constituted a further concession which was out of line with the Master Freight Agreement.

Apparently, Flickinger held no monopoly on the resentment harbored by Respondent against Deaner on these grounds. The foundation for his animus was implicit in the account of Respondent's executive vice president, John F. Voystock. It was the sense of the latter's testimony that the special needs of Respondent's motor carrier operations made it imperative that Local 776's concessions in the areas of training and length of workday be preserved. In the final analysis, Deaner's declared opposition to those important employer interests constituted the sole cause assigned by Respondent for the failure to employ Deaner.[10] Though Respondent had no obligation to hire him,[11] in view of Voystock's acknowledgment that Deaner was reported to be a good worker, it is concluded from the total circumstances that Deaner's declared opposition to internal union policy was the motivating factor underlying Respondent's communication of its refusal to consider him for rehire on December 1, 1980, and its subsequent refusal to offer him employment on February 25, 1981.[12]

Based on the foregoing,[13] the legal issue presented is whether Section 7 is broad enough to encompass employee views and opinions as to the course of internal union policy, where espousal of such attitudes collide with, or run counter to, employer interests.[14] Among other things, Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . to refrain from any or all such activities . . . ." Participation in the ongoing dialogue through which a consensus among workers pertaining to their conditions of work is achieved lies at the cornerstone of our system of industrial self-government, and is inseparable from the explicitly defined Section 7 right to engage in collective bargaining. Furthermore, the Act contemplates a system of collective bargaining which is both free and independent, yet, neither term would accurately obtain if the role of the membership in the formulation of internal union policy were subject to influence through the inherent authority of employers over hiring and firing. These considerations provide the threshold for longstanding Board authority banning employers from such "an inexcusable intrusion into the private affairs of the Union and the

ees. Thereafter, on May 4,1981, Respondent hired three dock trainees. Since I construe the amended complaint as alleging actual discrimination initially from February 25, 1981, the absence of a vacancy on December 1, 1980, is of no solace to Respondent. In any event, under established Board authority the existence of a vacancy is not indispensable to the 8(a)(3) violation. See *Shawnee Industries, Inc.*, 140 NLRB 1451, 1452-53 (1963), enfd. on other grounds 333 F.2d 221 (10th Cir. 1964); *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98, 99-100 (1980); *Alexander Dawson, Inc.*, 228 NLRB 165 (1977); *King Soopers, A Division of Dillon Companies, Inc.*, 257 NLRB 1033 (1981). Cf. *Hasbro Industries, Inc.*, 254 NLRB 587 (1981); *Anchorage Times Publishing Co.*, 237 NLRB 544 (1978); *Daniel Construction Company*, 244 NLRB 704 (1979).

[10] Argumentation in Respondent's post-hearing brief, through which a purity of motive is ascribed to Respondent from counsel's own speculative interpretations of the events, is deemed to be beside the point. Counsel are bound by the causation described in their own evidence.

[11] At no time since October 1979 did Deaner file a new employment application with Respondent. However, the record does not disclose that such a requirement with respect to an unfulfilled probationer was published to employees generally. Nor does it appear that any representative of Respondent informed Deaner that refiling was required. In any event no witnesses for Respondent testified that such failure to file influenced the action taken against Deaner.

[12] Deaner's participation in TDU was known by Flickinger prior to December 1. Flickinger acknowledged that just prior to their conversation of that date he was "shocked" at discovery of that fact. Nonetheless, in the circumstances, I am hesitant to conclude that TDU specifically was anything but incidental to the motivation on which Respondent acted. Rather, the view held by a supporter of TDU, though, perhaps, an inseparable factor, is found to constitute the actual cause behind Respondent's action.

[13] The evidence fails to substantiate Respondent's further claim that Deaner would not have accepted a position as dock trainee, even if offered, and that he was not qualified for any other position. It is clear that Respondent hired no one outside of the training program between December 1, 1980, and October 1981, and it is possible that Deaner may not have qualified for the experienced position filled on the latter date. Nonetheless, Respondent by its own inaction has left the foundation for any such defense in an ambiguous state. It is true that, in the course of a long narrative response, Flickinger made a somewhat oblique reference to Deaner's rejection of a position in August 1980 as a "driver trainee." Beyond that, however, the matter was left undeveloped. Even assuming that such position was refused by Deaner, that factor is of little relevance since it was not among the motivating considerations described by Flickinger, and in any event did not relate to Deaner's efforts to obtain employment on the dock. The only circumstance in which Deaner was offered a job as a dockman trainee derived from settlement discussions, in which an offer of employment was made to a Board agent plainly conditioned upon withdrawal of the unfair labor practice charges, and as part of a dialogue through which the parties sought to fashion a mutually acceptable formula for disposal of this proceeding. Upon rejection of that offer by the Board agent on behalf of Deaner, Respondent did nothing to suggest that, independent of those negotiations, it was willing to employ Deaner as a dockman at any time or under any circumstances. Furthermore, in October 1981, the Company hired a dockman outside the training program on the basis of his working experience; i.e., 2 years' experience in the job classification within the past 5 years in the LTL motor carrier industry. Although Voystock testified that he had no knowledge as to whether Deaner was eligible for such a position, Respondent made no effort to determine whether this was the case, and hence the matter is left in a speculative state.

[14] In the circumstances, the cases cited by Respondent pertaining to "lack of knowledge" are inapposite.

employees it represented."[15] Consistent therewith in *Nu-Car Carriers, Inc.*, 88 NLRB 75 (1950), enfd. 189 F.2d 756 (3d Cir. 1951), cert. denied 342 U.S. 919 (1952), the Board at 76–77 stated:

> We do not believe that the intent or purpose of the amended Act is to foreclose employees from questioning the wisdom of their representatives or from taking such steps as they deem necessary to align their union with their position. The Board has previously stated that interference with intraunion disputes, under certain circumstances, may be violative of the Act to the same extent as coercion exerted in employer-union or interunion conflicts. The discharge of a dissident within a union when that termination is motivated by a desire to eliminate protest must inevitably result in an infringement under Sections 8(a)(1) and 8(a)(3) of that employee's right to self-organization. We believe that inherent in that right is the privilege of protest and persuasion of others. Without this, effective employee representation becomes a nullity.

Notwithstanding the above, Respondent contends that its action against Deaner may be equated with legitimate employer reaction of demonstrative conduct on the part of an employee in derogation of an established collective-bargaining relationship. It is true that statutory protection *may* be lost should employees engage in a refusal to perform in accordance with the term of negotiated agreements,[16] or participate in overt acts injurious to employer interests,[17] or which undermine the Union's status as exclusive representative.[18] In those circumstances, other statutory policies might well be entitled to primacy over the employee activity.[19] Here, however, the discrimination against Deaner was founded upon an assertion of statutory rights under conditions which created no tension with other overarching statutory policy. His expressed attitudes, insofar as this record discloses, were implemented solely through the medium of verbal and written persuasion, transcommunicated to fellow members within the framework of the Union. In sum, speech, not conduct, was involved and there was neither violation of subsisting agreements nor acts in derogation of the Union's status as exclusive representative.[20]

In the total circumstances, I find that Respondent violated Section 8(a)(3) and (1) of the Act on December 1, 1980, by declaring that it would not hire Deaner in the future, and, on or after February 26, 1981, by refusing to offer employment to Deaner, all because he held views in opposition to a union policy whereby Respondent enjoyed concessions from the Master Freight Agreement.[21]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by on December 1, 1980, informing Charles Leo Deaner, Jr., an applicant for employment, that he would not be hired, and by on February 26, 1981, refusing to offer him employment because of his union activity.

4. The above unfair labor practices constitute unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having found that Respondent discriminatorily refused to offer Charles Leo Deaner employment on or about

[15] *Paranite Wire & Cable Division*, 164 NLRB 319, 320 (1967); *The E. W. Buschman Company, Incorporated*, 153 NLRB 699, 712 (1965), and cases cited at fn. 8 thereof.

[16] *N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U.S. 332 (1938).

[17] *N.L.R.B.* v. *Local Union 1229, IBEW [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953). Contrary to Respondent, Deaner's opinions were not stripped of their protected status because describable as "potentially disruptive" or because his views "might cause dissension among the work force." Sec. 7 cannot hang from so delicate a thread. The employee activity protected thereby will seldom be immune from such characterizations by managers. The aptness of such characterization is heightened where, as here, the views of the employee threaten important economic concessions won by the Employer from the Union.

[18] *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). Contrary to Respondent, there is no evidence to substantiate that Respondent had reasonable basis for belief that Deaner, if hired, would have engaged in activity in derogation of the collective-bargaining agreements. Although Respondent points to the fact that Deaner had previously been terminated from his employment at Eastern Express on the stated ground that he was "impeding the employer's operation," this discharge was subsequently converted to a suspension, and insofar as this record discloses, the offense on which that discipline was based derived from Deaner's having talked to coworkers during working time. In any event, the record does not disclose that Flickinger had any knowledge of this incident, formed any conclusions based thereon, or was actuated thereby in discriminating against Deaner.

[19] See, e.g., *Swank Construction Company*, 239 NLRB 844 (1978) ("the employer retaliated against [the employee] not because he invoked the grievance-arbitration procedure, but because he bypassed the contract procedure in the jurisdictional dispute matter); *N.L.R.B.* v. *Furriers Joint Council of New York, etc.*, 224 F.2d 78 (2d Cir. 1955) (employee violation of valid provisions of a collective-bargaining agreement).

[20] See, e.g., *Local 28, Sheet Metal Workers International Association, AFL-CIO (Treadwell Corporation)*, 243 NLRB 1061, 1065 (1979); *American Steamship Company, a Subsidiary of General American Transportation Corporation*, 222 NLRB 1226, 1236–39 (1976).

[21] To further excuse its unlawful conduct, Respondent points to the fact that the Regional Director, with approval of the General Counsel in Washington, dismissed Deaner's unfair labor practice charge insofar as it was predicated on an alleged discriminatory refusal to hire on August 29, 1981. The Regional Director concluded that there was insufficient evidence at that time to establish that the employer unlawfully refused to hire, stating specifically that "the investigation disclosed that the employer elected to hire trainees to fill its needs for dock employees." Respondent observes that the implication of the Regional Director's letter is that Deaner was not eligible or interested in such positions. This is not an impermissible interpretation of the basis for the Regional Director's action. Nonetheless, while the Region's disposition forecloses me from finding an unfair labor practice in August 29, 1980, beyond that it is irrelevant to this proceeding. The issue before me concerns alleged discrimination in December 1980 and February 1981, and whatever facts were before the Regional Director as of the earlier date, and whatever his interpretation and analysis thereof, his views with respect to earlier events are irrelevant and fail to give rise to an estoppel impeding the processing of the instant complaint on the record made.

February 26, 1981, it shall be recommended that Respondent offer him immediate employment in the position of probationary dockman trainee or probationary experienced dockman,[22] discharging any person hired since February 26, 1981, if necessary and without prejudice to the seniority or other benefits Deaner would have enjoyed had he been hired at that time. It shall further be recommended that Respondent be ordered to make Deaner whole for any loss of earnings he may have suffered by reason of Respondent's unlawful refusal to hire him, said backpay to be reduced by net interim earnings and to be computed on a quarterly basis as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The Respondent, Central Storage and Transport Co. of Harrisburg, Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Informing an employee that he no longer will be considered for employment because of his union activity.

(b) Discouraging employees from engaging in union activity by refusing to hire, or in any other manner discriminating with respect to their wages, hours, or terms and conditions of employment.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer immediate employment to Charles Leo Deaner, Jr., as a probationary employee in the classification of either dock trainee or experienced dockman, as may be appropriate in his circumstances, without loss of seniority or other benefits, and make him whole for earnings lost by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Harrisburg, Pennsylvania, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[22] The question as to whether, under the terms of the training program, Deaner met the criteria for hire into the experienced classification is a matter which cannot be conclusively determined on the instant record. The issue is one which transcends the question of liability, and which would be appropriate for resolution in the compliance stages of this proceeding.

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."